Supreme Court, U.S.
FILED

(1)

No. 93 1811 MAY 3 1994

IN THE
SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

October Term, 1993

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ANTONIO MARENO,

Petitioner,

vs.

COUNTY OF WESTCHESTER,

Respondent.

---

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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# PETITION FOR WRIT OF CERTIORARI

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ANTONIO MARENO
Petitioner Pro Se
3505 Tulip Drive
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37 pp

## QUESTIONS PRESENTED

1. Was the Court of Appeals' imposition of a gag order on the publication of its summary affirmance of the district court dismissal of an attorney's age discrimination damage lawsuit under the ADEA against a political subdivision of the state an undertaking to maintain a double standard in age discrimination cases in derogation of petitioner's due process rights?

2. Was the Court of Appeals' disavowal sub-silencio of its own holdings in age discrimination cases as applied to the facts in this case a denial of constitutional due process to the petitioner?

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ANTONIO MARENO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The petitioner, Antonio Mareno, respectfully prays that a writ of certiorari issue to review the summary judgment and decision of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 3, 1993, and the order of said court entered herein on February 2, 1994.

## OPINIONS BELOW

The judgment of the Court of Appeals affirmed upon a brief opinion the district court's(Broderick, J.) Memorandum Order entered herein on June 14, 1993, which dismissed petitioner's complaint on the respondent's motion for summary judgment. The said judgment of affirmance and the underlying opinion are unreported, and are reproduced in Appendix A to this petition.

The Memorandum Order of the district court is reported as Mareno v. County of Westchester, 826 F. Supp. 710 (S.D.N.Y.1993), and is reproduced in Appendix B to this petition.

On December 13, 1993, petitioner timely filed in the Court of Appeals and served upon the respondent a Suggestion for Rehearing In Banc of the panel decision of December 3, 1993. By order en-

tered herein on February 2, 1994, petitioner's Suggestion for Rehearing In Banc was declined. The declension order is reproduced in Appendix C to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1993, although the time of entry is not noted. Petitioner's Suggestion for Rehearing In Banc was declined on February 2, 1994, and this petition was served and filed within ninety(90) days of the latter date. The jurisdiction of this court is invoked under Title 28, United States Code, §1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States reads in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE*/

On April 5, 1989, the Westchester County Attorney placed the following advertisement of attorney positions in her office in The New York Law Journal(31):

> ATTORNEYS - The Westchester County Attorney's office seeks qualified attorneys with 3 years' minimum experience to fill 2 positions, 1 in litigation bureau and 1 in contracts and real estate bureau. Litigation and/or municipal experience a plus. Must be admitted to NY Bar. Salary $38,000 + Excellent benefits package. Send resume specifying position sought to: Marilyn J. Slaatten, Westchester County Attorney, 600 Michaelian Office Building, White Plains, NY 10601.

Apparently, after placing this advertisement in the law journal, the county attorney came to a realization that funding would not be available for hir-

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*/ Numerals in parentheses are references to page numbers of the Joint Appendix on the appeal to the Court of Appeals.

ing attorneys at the stated grade level, i.e., first step of Group Level XIII salaried at $38,990[see Addendum, Appellant's main brief below], because she aborted further consideration of this level of attorney solicitation unbeknown to the 20 lawyers, including petitioner, who had responded to the advertisement by submitting resumes. See Collective Exhibit 10 introduced at (33).

What she did was to flat out lie to 16 of the facially qualified responding attorneys, including petitioner, by informing each of them by letter that her office was too busy to interview all of the attorneys who had responded, and, therefore, had decided not to interview them; and this, while not interviewing any of them, nor retaining any of their resumes for future consideration(33-34).

As to the remaining four responding attorneys who should not have tendered

resumes in the first place, either because they had not even taken the bar examination[3 instances], or because the responding attorney's experience was not suitable for the position[1 instance], the county attorney, nevertheless, held out hope for future consideration of them by retaining the one unsuitable resume in her active file for future reference, and by advising the others to reapply after taking the bar examination(34).

Then, with this behind her, and the positions remaining unfilled, the county attorney turned around and placed the same advertisement for entry level attorneys in the law journal in May and June of 1989 which she had published in the law journal in November, 1988 that netted her some 94 resume responses, including one from petitioner, and from which grouping she and her deputy had

actually interviewed 4 of the responding candidates while retaining the resumes of 5 others for future consideration(36). And see resumes numbered 11,38,61,62. and 76 of Collective Exhibit 15 introduced at (36).

## REASONS FOR GRANTING THE WRIT

### [I] CONCEALMENT OF THE ISSUE MASKS A DOUBLE STANDARD WHICH OFFENDS DUE PROCESS IN THIS CASE

Any form of press censorship that stands between the public and its right to know the truth is deplorable in a democratic society. But when that kind of restraint has been honed to an art form in judicial print media publication of court decisions, the practice is intolerable.

In this case the core findings reflected in the district court's reported decision were generated from evidence adduced by petitioner's pretrial discovery efforts and the marshalling of public

records available at depository libraries at the county seat of government, to reach which point petitioner had to bide his time for some 23 months before being able to register input in the proceeding initiated by his charge of age discrimination in employment filed with the EEOC on August 7, 1989. Yet, one would never recognize petitioner's evidentiary input in the case, judging by the role reversal manifest in the district court's decision.

Petitioner never accused the respondent of refusing to hire him, only in refusing to interview him. See page 2 of Exhibit A[moving affidavit of the deputy county attorney] introduced at (8) - a posture which has been consistent since petitioner signed off on his EEOC charge with the words: " D.O.B.: 10/16/27

> In November 1988, and again in April 1989, I applied for several positions with the above named Respondent, all

> of which I qualified for. On both occasions, I was denied a[sic] interview for the positions.
>
> I was told in both responses (12-88 & 4-89) that because of the voluminous amount of responses, they were unable to interview all of the applicants.
>
> I believe that I have been discriminated against because of my age(61) in violation of the Age Discrimination in Employment Act of 1967, as amended.
>
> Upon belief the positions were filled by younger less experience[sic] persons."

Although this charge opened the door for exclusionary employment practice inquiry and adjudication relative to positions placed in the public domain for hiring purposes, both the EEOC and the courts below have steadfastly remained above the fray by characterizing petitioner's complaint as a failure to hire because of age rather than as a failure to consider for hire because of age - the latter category of complaint being considerably less difficult to establish by proof than the former.

In this connection the Second Circuit's summary affirmance and imposition of a gag order on publication has only served to muddy the water, given the fact that the panel did not endorse the district court's decision entirely. But just where the panel chose to draw the line remains shrouded in mystery, and is anybody's guess.

Did the panel reject Judge Broderick's gratuitous finding that most of the attorney positions in the county attorney's office are entry-level, as against petitioner's evidentiary showing that no attorney position is classified at entry-level or below grade XIII in that office? See Addendum to appellant's main brief, i.e., salary scale chart, and Exhibit 24[1989 Law Department Budget] introduced at (55). Did the panel reject the district court's reliance on the EEOC unilateral investigatory findings which

froze petitioner out of the picture completely? See Point II, appellant's main brief, pp. 7-10. Or, did the panel have some other unannounced reason for not embracing the district court's reasoning entirely? There simply is no way to know from its terse opinion on the appeal.

To some extent the EEOC had to be influenced in the off-track direction it took in the investigation by the less than candid responses it evoked from the county attorney whose attention it commanded exclusively for 23 months. In short, the falsehood she told the responding attorneys about the volume of interviews her office was conducting was double edged. Not only did she lie to these attorneys, including petitioner; she also lied to the EEOC. She told them that she had interviewed 16 responding candidates, but did not interview

petitioner because his experience was not suitable to warrant an interview. See page 1 of Collective Exhibit B[EEOC interim determination by the New York District Office] introduced at (33).

No useful judicial purpose is served in the case by the appellate panel's undertaking to obscure the facts by means of a gag order in this case. Just as it was the district court's duty to accord to petitioner's evidence the most favorable inferences to be drawn from the underlying facts(see United States v. Diebold, Inc., 369 U.S. 654, 655(1962) ), so it was the appellate panel's duty in this ADEA case to assure the full availability of the judicial forum for the ultimate judicial resolution of discriminatory employment practices. Alexander v. Gardner-Denver Co., 415 U.S. 36(1974).

Government by deception at any level ought not to be encouraged in the

courts in the resolution of judicial disputes, and certainly not through judicial inattentiveness as at bar.

Petitioner respectfully submits to this honorable court that the virtual trashing of his Rule 56(c) evidence in this ADEA case in the hands of the lower courts, coming as it does on the heels of a protracted and lack lustre performance at the administrative level spanning almost 2 years, should rank among the highest priorities commanding the attention of the court. The removal of the case from public scrutiny by the circuit panel threatens to reduce petitioner's case to the "second class treatment" which the Honorable Stephen Reinhardt, a U. S. Circuit Judge for the Ninth Circuit, forcefully argues is the fate of a substantial number of cases brought to the federal courts by ordinary citizens, and whose right to be

vindicated in these courts is being placed in jeopardy by the federal judiciary itself. See page A17, The New York Times, May 17, 1993, in a dialogue with the Honorable Jon O. Newman, a U. S. Circuit Judge for the Second Circuit, arguing that "More Cases Should Be Heard".

[II] DISAVOWAL OF CONTROLLING CIRCUIT PRECEDENT DENIES DUE PROCESS IN THIS CASE

In no uncertain terms the Second Circuit held in Markham v. Geller, 635 F.2d 1027(2d Cir.1980), cert. den., 451 U.S. 945(1981) that budget-driven hiring practices that operate to reduce the desirable experience levels of competing candidates being considered for job vacancies in the public domain have a disparate impact as a matter of law upon older, more experienced competing candidates in violation of ADEA requirements. And the Markham holding, which involved

the displacement of an older, temporary teacher by a younger, permanent teacher as the result of school district cost cutting policies, has been extended by the circuit to cases where prospects for financial savings have influenced the exclusion of older workers from taking other jobs. See Air Line Pilots Ass'n v. TWA, 713 F.2d 940(2d Cir.1983)[evidence of TWA's practice of granting downgrading requests of all pilots with sufficient seniority except requests of captains and first officers who reach 60].

Thus, in shutting down an exclusionary hiring practice in the TWA case in line with its seminal holding in Markham, the Second Circuit joined the Third Circuit which likewise struck down an exclusionary hiring practice earlier in the year. See EEOC v. County of Allegheny, 705 F.2d 679(3rd Cir.1983),

where the county refused to permit applicants over 35 years of age to take the examination for police officer.

In petitioner's case the county attorney was inhibited from following through with her April, 1989 solicitation, which, parenthetically speaking, was anything but a solicitation for entry-level attorneys as the district court's opinion suggests, because the county Legislative Board, empowered under the County Law to create, fund, and abolish the position of Assistant County Attorney, had not affixed its imprimatur upon the contemplated undertaking. And in the end the county attorney had to settle for board funding which enabled her to hire only 10 of the 15 additional attorneys she sought funding for, and these, only at the entry-level with one exception(29-30). And see Addendum, Appellant's Reply Brief.

It may interest this court to know that by the time the appeal was submitted below all of the entry-level attorney positions had been filled, according to information released to the local print media.

That this scenario was budget-driven within the Markham doctrine is evidenced in the deposition testimony of the county attorney who let the cat out of the bag when she linked staff attorney hiring with the legislative board's hiring policy which resulted in the imposition of budgetary constraints that cut attorneys from her budget(29-30). And Markham was relied upon by the magistrate judge who managed discovery in this case when he directed the county attorney to give deposition testimony regarding the "farming out of work to outside counsel in light of the budget structure of her office, which reflects limited areas of

concentration, which favor the hiring of less experienced attorneys for in-house legal work"(2-3).

There can be no doubt about the fact that on the uncontrovertible facts of this case Markham and its progeny, Air Line Pilots Ass'n, which were relied upon by petitioner in the court of appeals are controlling precedents governing this case which should have been followed by the circuit panel. And the failure of that panel to even address these cases strongly implicates the denial of due process in this case to petitioner which should be redressed by this court.

## CONCLUSION

For the reasons stated, the petition herein for a writ of certiorari

should be granted.

Respectfully submitted,

/s/

ANTONIO MARENO
Petitioner Pro Se

May, 1994

APPENDIX A - JUDGMENT OF THE COURT OF APPEALS

N.B. THIS JUDGMENT WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of December one thousand nine hundred and ninety-three.

Present: HONORABLE THOMAS J. MESKILL,

HONORABLE AMALYA L. KEARSE,

HONORABLE DENNIS G. JACOBS,

Circuit Judges.

- - - - - - - - - - - - - - - - - - - - - - -

ANTONIO MARENO,

Plaintiff-Appellant,

- v. - No. 93-7679

COUNTY OF WESTCHESTER,

Defendant-Appellee.

- - - - - - - - - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of

New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted by plaintiff pro se and by counsel for defendant.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Broderick's Memorandum Order dated June 10, 1993. See also SEC v. Research Automation Corp., 585 F.2d 31,33(2d Cir.1978) (party opposing a properly supported motion for summary judgment cannot defeat the motion with unsupported allegations).

s/ Thomas J. Meskill,USCJ
s/ Amalya L. Kearse,USCJ
s/ Dennis G. Jacobs,USCJ

APPENDIX B - MEMORANDUM ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - -

ANTONIO MARENO,
Plaintiff,

-against- 92Civ.2560(VLB)

COUNTY OF WESTCHESTER,

Defendant.

- - - - - - - - - - - - - - - - - - - - - -

VINCENT L. BRODERICK, U.S.D.J.

I

In this Age Discrimination in Employment suit brought pursuant to 29 USC § 621 et seq., plaintiff alleges that the defendant County of Westchester (the "County") failed to hire him as an attorney because of age.

Jurisdiction is predicated upon 28 USC §§ 1331, 1337 and 1343. The County has moved for summary judgment dismissing the complaint pursuant to Fed.R.Civ.

P. 56.

I grant the County's motion based on lack of evidence to support plaintiff's claims, and dismiss the complaint.

II

Plaintiff claims that in April 1989, when he was 61 years of age, he applied for a position with the law department of the County in response to an advertisement. None of the 19 persons who applied at the time were interviewed or hired, and the County placed similar advertising in June 1989. Most of the jobs open for lawyers seeking to work for the County law department are at the entry level; the County recruits from law schools as well as through advertising, and it utilizes outside law firms to conduct much of its legal business.

The United States Equal Opportunity Commission conducted an investigation of plaintiff's complaint and filed a report,

of which a copy is attached to this memorandum order as Exhibit A. None of the findings of the Commission has been controverted; consequently I accept them for purposes of the present motion. The Commission found that during the relevant time frame the County law department "hired many attorneys over forty years of age," who were still employed there, including one who was hired at age 59. The Commission further found that at the time plaintiff's complaint was brought approximately 27% of the respondent's law department employees were over 40 years of age.[1]

No significant evidence of discrimination has been produced. I find plaintiff's claims "implausible," see Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,587(1986), and unsupported. The clerk is directed to close this case.

SO ORDERED.

Dated: White Plains, New York
June 10, 1993

s/
VINCENT L. BRODERICK,
U.S.D.J.

Copies mailed to:

For Plaintiff pro se:

Antonio Mareno, Esq.
3505 Tulip Drive
Yorktown Heights, NY 10598

For Defendant:

Marilyn J. Slaatten, Esq.
County Attorney
600 Michaelian Office Bldg.
148 Martine Ave.
White Plains, NY 10601
(914) 285-2685

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[1]By memorandum order dated February 11, 1993 I directed the County to respond to discovery requests of plaintiff made prior to that date, and indicated that an adverse inference might be drawn, if appropriate, from failure to do so. While plaintiff asserts that not all materials requested have been furnished, no unproduced documentation would appear to be of significant relevance to the case.

Plaintiff sought resumes of numerous other applicants, with no indication that these could contradict the findings

of the Equal Employment Opportunity Commission. He also sought statistics relating to monies expended for County legal activities and for outside counsel.

Since I do not find that such information would alter the outcome of the present motion, I need not consider the County's argument that plaintiff's requests were untimely.

E X H I B I T A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Charge No. 160-89-1884

Antonio Moreno — Charging Party
3505 Tulip Drive
Yorktown Heights, NY 10598

County of Westchester — Respondent
Michaelian Office Building
Room 600
148 Martine Avenue
White Plains, NY 10601
Attn: Susan B. Owens

DETERMINATION ON REVIEW AND DISMISSAL OF ADEA CHARGE

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. In his Request for Re-

view, Charging Party alleges that he was discriminatorily not hired by Respondent because of his age. Charging Party also contends that he has a witness who would support his contentions of age discrimination.

During the investigation, Charging Party claimed that Respondent has engaged in a long standing pattern and practice of age discrimination. Both before and after Marilyn Slaaten was appointed County Attorney in December, 1988, Respondent hired many attorneys over forty years of age. In 1984 Respondent hired a forty one year old, a forty three year old and a forty nine year old. In 1986 Respondent hired a fifty year old and a fifty five year old. In 1987 Respondent hired a fifty nine year old. In 1988 Respondent hired a forty three year old and a forty seven year old. In 1990 Respondent hired a fifty five year old and a

sixty year old. All the individuals described above were still employed by Respondent at least through 1990. Additionally, at the time of Charging Party's charge, approximately 27% of Respondent's employees were forty years of age or older. As the above reveals, the evidence does not show Respondent discriminates against individuals because of their age or that Charging Party was not hired because of his age. Our analysis discloses that, during the original investigation and in his Request for Review, Charging Party was given opportunities to provide the name of his witness. Charging Party failed to do this and has still not provided the name. Given the other evidence presented in this case, further pursuit of this issue isn't warranted.

Based upon this review, we agree with the determination issued by our field

office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statute. Therefore, the commission dismisses and terminates its administrative processing of this charge.

As the charge alleged an Age Discrimination in Employment Act(ADEA) violation, the Charging Party may have a right to sue under that statute. ADEA lawsuits must be brought within two years of the occurrence of the alleged discriminatory act(s) (three years in cases of willful violations). Based on the evidence in the file, it appears that the first alledgedly discriminatory incident encompassed by the charge may have occurred as early as April 14, 1989.

On Behalf of the Commission:

s/ Michael J. Dougherty
Director
Determinations Review Program

cc: Spencer Lewis, Director
New York District Office

APPENDIX C - ORDER ON REHEARING OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February one thousand nine hundred and ninety-four.

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ANTONIO MARENO,
Plaintiff-Appellant,

-v.- DOCKET NUMBER: 93-7679

COUNTY OF WESTCHESTER,
Defendant-Appellee.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant Antonio Mareno.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the sugges-

tion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:

s/ Carolyn Clark Campbell

Chief Deputy Clerk